UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Entergy Mississippi, Inc. Docket Nos. ER03-171-002
ER03-171-003
ER03-171-004
ER03-171-005

ORDER DENYING REHEARING IN PART AND GRANTING REHEARING IN PART, AND PROVIDING CLARIFICATION

(Issued November 16, 2006)

1. Entergy Mississippi, Inc. (Entergy) and South Mississippi Electric Power Association (SMEPA) filed requests for rehearing of a January 31, 2003 order that accepted, in part, an interconnection and operating agreement (Silver Creek IOA) between Entergy and SMEPA, but required Entergy to provide SMEPA with credits against its transmission bills.[1] The order also directed Entergy to file the agreement under which SMEPA would lease the facilities (Lease Agreement) pertaining to the Silver Creek IOA to Entergy under section 205 of the Federal Power Act (FPA),[2] and to either file the Lease Agreement under section 203 of the FPA[3] or to explain why such a filing is not needed.

2. As discussed below, this order denies Entergy's request for rehearing. Entergy cannot directly assign the costs of the facilities because they are network facilities on Entergy's transmission system. We clarify that Entergy is not required to repay SMEPA

[1] *Entergy Mississippi, Inc.*, 102 FERC ¶ 61,105 (2003) (January 2003 Order).

[2] 16 U.S.C. § 824d (2000).

[3] 16 U.S.C. § 824b (2000), *as amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 983-84 (2005).

specifically by means of transmission credits, but Entergy must repay SMEPA in some way. As discussed below, Entergy may choose to reimburse SMEPA under the Lease Agreement.[4] We again order Entergy to file the Lease Agreement under section 205. In addition, we will grant SMEPA's request for rehearing and find that section 203 approval is not required for the Lease Agreement.

I. Background

3. Entergy filed the Silver Creek IOA with the Commission under Entergy's open access transmission tariff (OATT).[5] The Silver Creek IOA sets forth the terms and conditions governing the interconnection of an electric generating facility (Silver Creek Facility) owned by SMEPA to Entergy's transmission system in Mississippi.

4. Under the Silver Creek IOA, SMEPA will, at its own expense, construct and own a nine-breaker expansion to Entergy's existing Silver Creek 115 kV substation. The Silver Creek IOA also requires that SMEPA lease the nine-breaker expansion to Entergy for one dollar per year. During the term of the Lease Agreement, Entergy will operate and maintain the nine-breaker expansion and SMEPA will pay Entergy for all actual, reasonable and appropriate costs Entergy incurs to maintain and operate the expansion.[6]

5. In the January 2003 Order, the Commission found that SMEPA's nine-breaker expansion was at or beyond the point of interconnection and was thus a network facility on Entergy's transmission system. Accordingly, Entergy was directed to provide SMEPA with transmission credits, with interest, against the rates SMEPA pays for delivery service.

6. In addition, the January 2003 Order explained that if the parties wish to retain the Lease Agreement, Entergy must file it under section 205 of the FPA. Moreover, we stated that the lease appears to involve an acquisition of operational control over

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[4] We are deferring action on Entergy's revised Silver Creek IOA, Docket No. ER03-171-004, which provides that Entergy will repay SMEPA by means of transmission credits as required in the January 2003 Order, until Entergy notifies us whether it intends to repay SMEPA through the transmission credits or through the Lease Agreement.

[5] *See* Transmittal Letter at 2.

[6] Section IV of the Lease Agreement.

jurisdictional facilities and directed Entergy to either file for approval of the transaction under FPA section 203 or to explain why such approval was not needed.

7. On February 19, 2003, Entergy filed an explanation as to why the submittal of the Lease Agreement is not required by either section 203 or section 205 of the FPA. Entergy also attached the Lease Agreement to its response. Entergy did not, however, file the Lease Agreement under section 205, as we had directed.

8. On March 3, 2003, Entergy filed a revised Silver Creek IOA, under protest, that provides credits to SMEPA in compliance with the January 2003 Order. On the same day, Entergy and SMEPA filed requests for rehearing of the January 2003 Order.

9. On March 31, 2005, a data request was issued to Entergy requesting additional information concerning past interconnection arrangements with SMEPA and similar lease arrangements with other wholesale customers. On May 2, 2005, Entergy filed its response.

II. Notice and Pleadings

10. Notices of Entergy's compliance filings were published in the *Federal Register*, 68 Fed. Reg. 10,007 (2003), and 68 Fed. Reg. 12,062 (2003), with interventions and protests due on or before March 12, 2003, and March 24, 2003, respectively. None were filed.

11. Notice of Entergy's response to the data request was published in the *Federal Register*, 70 Fed. Reg. 25,562 (2005), with interventions and protests due on or before May 23, 2005. None were filed.

III. Discussion

A. Whether Upgrade is a Grid Facility; Nature of the Silver Creek IOA

12. Entergy now claims, in its request for rehearing, that the Silver Creek IOA is not a service agreement under Entergy's OATT, as it claimed in its original filing. Rather, it states that the Silver Creek IOA is an amendment to a 1979 "system-to-system" interconnection agreement for transmission service (1979 IOA) that is grandfathered from the Commission's "at or beyond" test for identifying network facilities. It further says that the Silver Creek IOA was based on Entergy's *pro forma* Generator Interconnection Agreement only "[f]or the sake of comparability." Entergy thus argues that the Commission incorrectly applied the "at or beyond" test to the nine-breaker expansion. Entergy states that the "at or beyond" test has been applied to the interconnection of generation facilities under Commission-approved OATTs, but not to

grandfathered transmission service agreements such as the 1979 IOA.[7] In its response to the data request, Entergy states that, except for one interconnection point identified in the 1979 IOA, it is not aware of any other interconnection arrangements in the past under the 1979 IOA.[8]

13. To bolster its argument that the Silver Creek IOA is not subject to the "at or beyond" test, Entergy also claims that this case is similar to *Alabama Power Company*.[9] In that case, the Commission determined that the agreement there (rather than Order No. 2003) governed the interconnection at issue because the agreement's provisions, which predated both Order Nos. 888 and 2003, indicated that the parties intended the agreement to cover interconnections under certain conditions when both parties agreed that such conditions had been satisfied.[10] In other words, the agreement and the interconnection under it were grandfathered, and Order No. 2003 did not apply to them.

14. We reject Entergy's argument that the Silver Creek IOA should now be treated as being under the 1979 IOA as opposed to being a service agreement under Entergy's OATT. First, Entergy, in its original filing, stated that the Silver Creek IOA was being filed under its OATT, that it was based on Entergy's *pro forma* Generator

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[7] Entergy raises several concerns regarding the Commission's "at or beyond" test and whether it diverges from prior Commission precedent. Since Entergy's filing here, the Commission has addressed all of the issues raised by Entergy in the Large Generator Interconnection proceeding and will not repeat those conclusions here. *See generally Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 683-750 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 341 and 566-697 (2004), *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 at P 15-57 and 103-105 (2005), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 at P 6-27 (2005), *appeal docketed sub nom. National Assoc. of Regulatory Utility Commissioners, et al. v. FERC*, No. 04-1148, *et al.* (D.C. Cir. argued Oct. 13, 2006).

[8] The one interconnection point appears to be a system-to-system delivery point interconnection arrangement, as opposed to a generator interconnection, as is the Silver Creek IOA.

[9] 108 FERC ¶ 61,222 (2004) (*Alabama Power*).

[10] *Citing id.* at P 12.

Interconnection Agreement,[11] and that it contained a provision under which transmission credits would be provided to an interconnection customer where network upgrades were needed to accommodate a generator interconnection, consistent with Commission precedent. Entergy cannot simply ignore its own original characterization of the Silver Creek IOA as being under the OATT and now suggest that it must be considered as being under the 1979 IOA.

15. Attachment A, Appendix H, section 5 of the Silver Creek IOA, states that

> In the event of a discrepancy or conflict between the agreements regarding transmission service, such discrepancy or conflict shall be resolved in favor of the 1979 [IOA], as applied only to this Point of Interconnection for the SMEPA Silver Creek Off-System Generation resource. In the event of a discrepancy or conflict between the agreements regarding interconnection service for this facility, such discrepancy or conflict shall be resolved in favor of the [Silver Creek IOA]. (Emphasis added).

This indicates that the 1979 IOA governs only transmission service and that the Silver Creek IOA governs generator interconnection service.

16. We also disagree with Entergy's argument that this case is similar to *Alabama Power*. Entergy acknowledges that the Silver Creek IOA is really a "stand-alone" agreement, not an amendment to the 1979 IOA.[12] In any event, there is no evidence that the parties intended to interconnect new resources under the 1979 IOA. In fact, section 5.01 of the 1979 IOA, which Entergy cites in support of this argument, governs "Transmission Delivery Service," not interconnection service. Furthermore, the Silver Creek IOA was not anticipated in the 1979 IOA, as was the circumstance in *Alabama Power*. In *Alabama Power*, the agreement that the Commission found to be

[11] *See* the November 7, 2002 cover letter section 1 at 2-3. *See also* Attachment A (Memorandum of Understanding) article 1.0; article 8.3.1; and Attachment A, Appendix H, section 5.

[12] Second, section 1.0 of the Memorandum of Understanding (which is part of the Silver Creek IOA) states that the Silver Creek IOA "shall be deemed, interpreted and implemented as a complementary but *stand-alone* addendum to, and not as a substitute for or replacement of the 1979 [IOA]" (emphasis added).

grandfathered contemplated that the customer might choose in the future to self-supply by adding its own generation.[13] Here, there is no evidence of such contemplation.

17. Accordingly, we will deny Entergy's request for rehearing and will continue to treat the Silver Creek IOA as being under Entergy's OATT. Thus, our precedent on generator interconnection applies, and under that precedent, the generator must be reimbursed for upgrades to the transmission provider's grid that the generator pays for.

B. Is the Expansion on Entergy's Transmission System?

18. In the January 2003 Order, the Commission applied its "at or beyond" test to the nine-breaker expansion. Under that test, network facilities include all facilities at or beyond the point where the customer or generator connects to the grid.[14] The Commission found that the nine-breaker expansion was "at or beyond" the point of interconnection and thus, found it to be a network upgrade.

19. In its rehearing request, as supplemented by its response to the data request, Entergy argues that the January 2003 Order should not have applied the Commission's "at or beyond test" to the nine-breaker expansion in this case. Entergy bases this argument on two facts that are different from those in the typical generator interconnection case: the fact that SMEPA is to own the nine-breaker expansion and the fact that SMEPA is not simply a generator, but owns transmission of its own. Entergy argues that the expansion is really an expansion of the SMEPA transmission system, not a network upgrade on Entergy's transmission system.

20. We disagree. We recognize that the circumstances in this case are somewhat different from previous generator interconnection cases we have addressed in the two respects Entergy mentions: SMEPA also owns transmission facilities and SMEPA owns the nine-breaker expansion. The fact is, however, that the nine-breaker expansion is at or beyond the point where SMEPA's generator connects to Entergy's transmission system. Entergy submitted a one-line diagram with its Silver Creek IOA that clearly shows that

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[13] *Alabama Power*, 108 FERC ¶ 61,222 at P 12.

[14] *Entergy Gulf States, Inc.*, 98 FERC ¶ 61,014, *reh'g denied*, 99 FERC ¶ 61,095 (2002), *remanded*, *Entergy Services, Inc. v. FERC*, 391 F.3d 1240 (D.C. Cir. 2004), *reh'g and reh'g en banc denied*, No. 02-1199 (D.C. Cir. Feb. 11, 2005), *order on remand*, *Nevada Power Co*., 111 FERC ¶ 61,161, *reh'g denied*, 113 FERC ¶ 61,007 (2005), *appeal pending sub nom. Entergy Services Inc., et al. v. FERC*, No. 05-1238, *et al.*, (D.C. Cir. July 5, 2005).

the nine-breaker expansion is located within Entergy's pre-existing substation, which is a network facility on the Entergy grid. The new nine-breaker expansion performs a switching function to maintain the reliability of service over Entergy's network transmission lines. The fact that the Entergy substation has been upgraded to accommodate the interconnection of SMEPA's generator does not convert it into a non-network facility.[15] The nine-breaker expansion upgrade is a modification to a part of a substation that was a network facility before the interconnection of SMEPA's new generator. Furthermore, Appendix A to the Silver Creek IOA explicitly states that: "[SMEPA] will construct a nine-breaker expansion *to* [Entergy's] Silver Creek 115 kV Substation" (emphasis added).[16] Under these circumstances, we conclude that the expansion is on Entergy's system.

C. How Should SMEPA be Compensated?

21. The Commission's pricing policy regarding transmission system upgrades, i.e., network upgrades, requires that the generator pay for the upgrades up front, but that the Transmission Provider repay the generator through credits or other means.[17] As the Commission found that the nine-breaker expansion was a network upgrade, the January 2003 Order directed Entergy to provide transmission credits, with interest, for the cost of the nine-breaker expansion.[18] As we discuss further below, Entergy leases the nine-

[15] *See, e.g., Entergy Gulf States, Inc.*, 98 FERC ¶ 61,014 at P 61,023, *reh'g denied*, 99 FERC ¶ 61,095 (2002).

[16] Appendix A also specifies that the point of interconnection will be at "[Entergy's] side of each of the last dead-end structures of [SMEPA]'s 115 kV transmission lines connecting the [SMEPA's] generating facility to the Silver Creek Station 115 kV."

[17] *See Consumers Energy Company*, 95 FERC ¶ 61,233, *reh'g denied*, 96 FERC ¶ 61,132 (2001) (rejecting the direct assignment of improvements to integrated grid facilities (network upgrades)). *See also, Entergy Services, Inc.*, 95 FERC ¶ 61,437, *reh'g denied*, 96 FERC ¶ 61,311 (2001), *aff'd*, *Entergy Services, Inc. v. FERC*, 319 F.3d 536 (D.C. Cir. 2003).

[18] The Commission recently issued an order on rehearing clarifying that, while the recently approved Independent Coordinator of Transmission (ICT) for the Entergy system may reevaluate previously incurred interconnection costs, the ICT may not analyze such costs while the interconnection agreement is pending before the Commission or the Commission's order is on appeal. *See Entergy Services, Inc.*, 116 FERC ¶ 61,275 at P 203 (2006).

breaker expansion from SMEPA and has operational control of it under the Lease Agreement for one dollar per year. This payment does not adequately reimburse SMEPA for the cost of the nine-breaker expansion.[19] Although Entergy has made a compliance filing modifying the IOA to compensate SMEPA through transmission credits, it did so under protest. We will allow Entergy to choose instead to reimburse SMEPA through payment under the Lease Agreement. If Entergy chooses the latter, it can say so when it files the Lease Agreement with the Commission under section 205, as again ordered below.[20] Entergy must notify us within ten days whether it intends to pursue reimbursement under the Lease Agreement or through transmission credits in the IOA. In the meantime, we will defer action on the compliance filing.

D. Lease Agreement

1. Section 203

22. SMEPA argues on rehearing, and Entergy argues in its February 19 compliance filing, that the January 2003 Order erred in requiring Entergy to either file the Lease Agreement under section 203 of the FPA (because it involves a disposition of jurisdictional facilities through a change in control over the facilities) or to explain why such a filing is not needed. They state that "[s]ection 203 does not apply where, as is the case here, the facilities involved have not yet been used for jurisdictional activities (i.e., interstate transmission of electric energy of wholesale sales of electric energy)." Entergy also states that "the lease will commence *prior to* any activities that would render the [nine-breaker expansion] a 'jurisdictional facility.'"[21] In other words, it argues that the disposition of facilities takes place before the facilities become jurisdictional.

23. We agree that the disposition of the facilities takes place before the facilities become jurisdictional. Thus, we will grant rehearing and not require that the Lease Agreement be filed under section 203.

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[19] We note that the estimated cost for all the facilities to be constructed by SMEPA is $1,236,181. *See* Silver Creek IOA--Appendix A.

[20] *Cf.* Order No. 2003 at P 735 ("If the Interconnection Customer constructs Stand-Alone Network Upgrades, and chooses not to transfer ownership to the Transmission Provider, it will not receive a refund but may enter into a cost-based Lease Agreement with the Transmission Provider that places the upgrades under the Transmission Provider's operation and control").

[21] *See* Entergy's February 19, 2003 Compliance filing at 4 (emphasis added).

2. Section 205

24. Entergy did not file the Lease Agreement under section 205, as we ordered. It attached the Lease Agreement to its February 19, 2003, compliance filing, but argues that the Lease Agreement is not required to be filed under section 205 based on the Commission's "rule of reason."[22] It states that Entergy's one dollar expenditure to lease the nine-breaker expansion will not significantly affect Entergy's rates or services.[23]

25. We do not agree. Section 205(c) of the FPA states that

> every public utility shall file with the Commission . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together *with all contracts which in any manner affect or relate to such rates, charges, classifications, and services*. (Emphasis added).

26. In *Prior Notice and Filing Requirements Under Part II of the Federal Power Act (Prior Notice)*,[24] the Commission set forth a two-part test to determine when Operation and Maintenance (O&M)-type agreements are subject to the Commission's jurisdiction under section 205 of the FPA. First, can the O&M service at issue be tied to wholesale sales or to transmission in interstate commerce or does it in any manner affect or relate to jurisdictional rates or services? Second, does a public utility provide the O&M service? If the answer to both questions is yes, then the O&M agreement must be filed for Commission review.

27. We find that the Lease Agreement must be filed under section 205 of the FPA. The O&M services provided by Entergy via the Lease Agreement will affect and relate to jurisdictional transmission services. And of course, Entergy is a public utility. Under the Lease Agreement, Entergy will operate facilities used to provide transmission services in interstate commerce that are jurisdictional to the Commission under section 205 of the FPA. The fact that Entergy will pay only one dollar for the lease is irrelevant; the

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[22] *Citing Resale Power Group of Iowa, Inc.*, 85 FERC ¶ 61,424 at P 62,599 (1998).

[23] In its May 2, 2005 response, Entergy notes that it is not aware of any other circumstances under the 1979 IOA in which SMEPA has owned a stand alone facility and leased it back to Entergy.

[24] 64 FERC ¶ 61,139 at 61,993, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

agreement must be filed because Entergy will affect transmission service through it. Accordingly, we reaffirm our determination in the January 2003 Order that Entergy is required to file the Lease Agreement under section 205 of the FPA.

E. Compliance Filings

28. Our review of Entergy's February 19, 2003, compliance filing shows that Entergy has complied with the January 2003 Order. As discussed above, we are deferring action on Entergy's March 3, 2003 compliance filing.

The Commission orders:

(A) SMEPA's request for rehearing is granted as discussed herein.

(B) Entergy's request for rehearing is denied, as discussed herein.

(C) Entergy's February 19, 2003, compliance filing is accepted.

(D) Entergy is required to file the Lease Agreement under section 205 of the FPA within 30 days of the date of this order.

(E) Entergy is required to notify the Commission whether it intends to provide for reimbursement under the Lease Agreement or through transmission credits in the IOA within 10 days of the date of this order.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Mississippi, Inc. Docket Nos. ER03-171-002
ER03-171-003
ER03-171-004
ER03-171-005

(Issued November 16, 2006)

KELLY, Commissioner, *dissenting in part*:

This order addresses requests for rehearing of an earlier order that presents some interesting and difficult issues. Entergy and its customer, South Mississippi Electric Power Association (SMEPA), agreed that some upgrades were needed to the grid to accommodate SMEPA's purchase of power from a new generating source. Normally, such network upgrades would be built and owned by Entergy and, at that time at least, SMEPA would not have been solely responsible for their full cost.[25]

Instead, the parties both agreed that SMEPA would build and own the upgrades at its own expense. So literally speaking, the facilities built under this IA became SMEPA grid facilities (fully integrated with Entergy grid facilities that surround them; much like the rest of SMEPA's facilities probably are). As noted above, in the normal interconnection scenario Entergy would retain ownership, or at least do the actual work, so some payment from the customer would be needed but here the customer both built and owns the facilities and thus no payment was made by the customer to Entergy for that construction.

Nevertheless, the underlying order states that the "expansion is at or beyond the point of interconnection and is thus a network facility, as opposed to a sole use facility." Apparently this statement referred to the pre-existing interconnection points between Entergy's system and SMEPA's system and, thus, held that since these upgrades took place beyond the pre-existing interconnection points, they must be considered Entergy network upgrades, irrespective of actual ownership.

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[25] It likely would have been required to pay for them up front and then would have had this payment refunded over time through credits in its transmission invoices from Entergy. While the subsequent advent of the Entergy ICT proposal, with its associated participant funding mechanism, changes Entergy's cost allocation process prospectively, any such changes would not seem to impact the outcome of this case since the customer owns the upgrades in question.

However, because these are in fact new SMEPA facilities, new interconnection points came into existence the moment they were constructed and connected to Entergy's neighboring facilities. By definition, these upgrade facilities are on SMEPA's side of these new interconnection points, not at or beyond.

Despite the fact that no payments were made to Entergy and the facilities cannot be considered "at or beyond" the point of interconnection unless one ignores the existence of the new interconnection points associated with these facilities, the earlier order directed credits as though Entergy had built and owned the facilities and merely charged SMEPA for them. The order at bar denies rehearing but now finds that credits are not the only way that Entergy can reimburse SMEPA. I would have granted rehearing and found that Entergy need not provide credits or any other reimbursement, since these are not Entergy facilities, they are not located on Entergy's side of the *relevant* interconnection points, and Entergy in fact never received any payment for these facilities from SMEPA.

I believe that SMEPA did receive value in exchange for agreeing to build and own these facilities itself. First, it was able to take direct control of the cost to build the facilities. More importantly, however, it retained ownership of these valuable grid facilities and, accordingly, gained the right to charge Entergy for their use or otherwise enter into a mutually agreeable arrangement for their joint use by both parties. The latter is apparently exactly what the parties did. While, I agree with my colleagues that the resulting $1 per year rate under which SMEPA permits Entergy to lease back these facilities does not appear compensatory, SMEPA apparently was satisfied with it. If it becomes unsatisfied with this payment, then it can presumably go to its regulator, the Rural Utilities Service, and seek a rate change. SMEPA's lease rate is simply not within our jurisdiction.

On the other hand, I completely agree that the operation and maintenance services that Entergy performs for SMEPA under the IA are jurisdictional services and the rates charged for them must be filed with us under section 205 and fully cost-supported.

Accordingly, I respectfully dissent in part from this order.

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Suedeen G. Kelly